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1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
TELEPHONE 202 736 8000  
FACSIMILE 202 736 8711  
www.sidley.com

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SHANGHAI  
SINGAPORE  
TOKYO

WRITER'S DIRECT NUMBER  
(202) 736-8538

WRITER'S E-MAIL ADDRESS  
phemmersbaugh@sidley.com

2/3/52

March 31, 2005

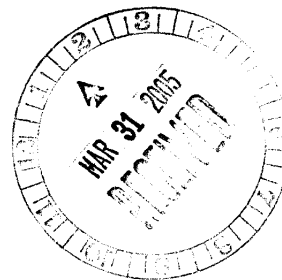
**BY HAND**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

MAR 31 2005

Part of  
Public Record



Re: ***STB Fin. Docket No. 34662, CSX Transportation, Inc.—Petition for Declaratory Order***

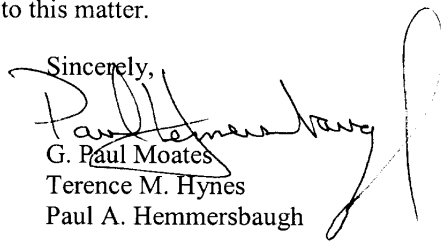
Dear Secretary Williams:

Enclosed for filing on behalf of Petitioner CSX Transportation Inc. ("CSXT") in the above-referenced proceeding are the original and 10 copies of CSXT's Reply to the Petition for Reconsideration of the District of Columbia. Also enclosed is a computer diskette containing an electronic copy of one of the three Replies.

Please acknowledge receipt of these submissions for filing by date-stamping the enclosed duplicate paper copies and returning them with our messenger. If you have any questions concerning this filing, please contact the undersigned.

Thank you for your attention to this matter.

Sincerely,

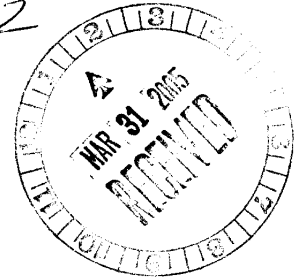
  
G. Paul Moates  
Terence M. Hynes  
Paul A. Hemmersbaugh

Enclosures

cc: Parties of Record

213652

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



**FINANCE DOCKET NO. 34662**

**REPLY OF CSX TRANSPORTATION, INC. TO  
PETITION FOR RECONSIDERATION  
OF THE DISTRICT OF COLUMBIA**

**ENTERED  
Office of Proceedings**

MAR 21 2005

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Public Record**

Irvin B. Nathan  
Mary Gabrielle Sprague  
Arnold & Porter LLP  
555 Twelfth Street, N.W.  
Washington, DC 20004-1205  
(202)-942-5000  
(202) 942-5999 (fax)

Ellen M. Fitzsimmons  
Peter J. Shudtz  
Paul R. Hitchcock  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, Florida 32202  
(904) 359-3100

G. Paul Moates  
Terence M. Hynes  
Paul A. Hemmersbaugh  
Sidley Austin Brown & Wood LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)

Dated: March 31, 2005

## PREFACE AND SUMMARY OF ARGUMENT

The District's Reconsideration Petition alleges neither changed circumstances nor new evidence, so its Petition may be granted only if it demonstrates that the Board's Decision issuing a declaratory order "involves material error." *See* 49 C.F.R. § 1115.3(b). The District's Petition – which simply repeats arguments the Board has already considered and rejected – fails to meet the "materially erroneous" standard and therefore should be denied. Despite reiterating several tangential and erroneous arguments against ICCTA preemption, the District does not – because it cannot – offer any argument to contradict the simple, airtight syllogism that dictates the outcome of this proceeding:

- A. ICCTA expressly and unequivocally pre-empts all State laws that seek to regulate rail freight transportation, including laws purporting to regulate the routing or movement of rail cars in interstate commerce;
- B. The D.C. Act is a "state" law that purports to regulate rail routes and the routing and movement of rail cars in interstate commerce; *Therefore*,
- C. The D.C. Act is pre-empted by ICCTA.

As the Decision demonstrates, this is not a close case. The DC Act attempts to regulate rail routes and the movement of rail cars and freight in interstate commerce, which are at the heart of the Board's exclusive jurisdiction, and have been the exclusive province of the federal government for more than a century. There has never been a decision by the ICC or the STB, or, to the best of CSXT's knowledge, any federal court decision that has upheld against an ICCTA preemption challenge a state law purporting to regulate directly railroad routes or the movement of freight by rail. The Decision's determination that the DC Act is preempted because it attempts to regulate rail routes and rail freight movement is unassailable, and renders the District's other arguments immaterial and irrelevant. *See* Decision at 7.

The District's contrary arguments are inapposite, because none applies to a state law that attempts to regulate directly activities that ICCTA expressly commits to the Board's exclusive jurisdiction. Rather, the District's arguments, and all of the cases it cites, pertain to state laws that seek to regulate matters at the periphery of the Board's exclusive jurisdiction, including certain types of zoning, environmental, and eminent domain laws that may indirectly affect rail transportation or rail lines. In such cases, the Board evaluates the particular indirect regulation at issue to determine its relation to, and effect upon, subjects governed by ICCTA, and balances the burden the regulation imposes on rail transportation and commerce with the interests asserted by the State, to determine whether the state regulation in question unreasonably burdens interstate commerce or otherwise unduly intrudes on the Board's exclusive regulation of rail transportation and related activities. In this case, however, the DC Act would directly regulate activities that Congress expressly committed to the Board's exclusive jurisdiction. No balancing of interests or effects on commerce is necessary or appropriate here, because ICCTA expressly, directly and unequivocally preempts the Act.

Thus, for example, the District's argument that the Board did not conduct an adequate factual inquiry is misdirected and incorrect. Because the question of whether ICCTA preempts the DC Act's attempted direct regulation of rail routes and the movement of rail freight is a question of law, no factual inquiry or balancing of burdens was necessary. Similarly, the District misses the point when it contends that the Board did not adequately consider whether the DC Act might also regulate in areas covered by other federal statutes. The Board appropriately determined only whether the DC Act is pre-empted by ICCTA, the statute whose administration Congress has vested in the Board. *See* Decision at 6 (“[O]ur decision here addresses only the preemptive effect of section 10501(b). The preemptive effect of other statutes is more properly

addressed by the agencies that administer those statutes, and by the federal district court.”). If, as CSXT believes, the DC Act also purports to regulate subjects covered by FRSA, HMTA or other federal statutes, separate analyses will determine whether the Act is also preempted by those statutes. The Board’s conclusion that ICCTA preempts the DC Act, however, is independent of, and unaffected by, whether or not any other federal statutes may also preempt the DC Act.

As demonstrated below, the District’s other arguments for reconsideration are similarly immaterial and misdirected. Despite the District’s attempts to divert the debate, the inescapable, dispositive fact is that the DC Act is a state attempt to regulate directly a subject that ICCTA expressly and specifically reserves as the exclusive province of the Board. This is an unusually straightforward preemption case – the arguments for preemption are extraordinarily compelling, and the Decision’s holding that ICCTA preempts the DC Act is unassailable. The Board should have no hesitation in rejecting the Reconsideration Petition and affirming its Decision.

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34662**

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**REPLY OF CSX TRANSPORTATION, INC. TO  
PETITION FOR RECONSIDERATION  
OF THE DISTRICT OF COLUMBIA**

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CSX Transportation, Inc. ("CSXT") submits this Reply Memorandum in Opposition to the District of Columbia's Petition for Reconsideration of the Board's March 14, 2005 Decision and Declaratory Order (the "Decision").

**INTRODUCTION**

The Board should deny the Petition for Reconsideration because it does not satisfy the District's heavy burden of demonstrating that the Board's Decision is materially erroneous. The District submits no new evidence, nor does it contend that circumstances have changed since the Board issued the Decision. Moreover, the District cites no new legal authority, but rather merely repeats the same, insufficient legal arguments it asserted in its previous submissions in opposition to CSXT's Declaratory Order Petition. At bottom, the District's argument for reconsideration is that it simply does not agree with the Board's legal analysis and decision. This reassertion of rejected arguments does not satisfy the District's heavy burden of on reconsideration, and provides absolutely no justification for the Board to revisit its careful analysis and sound Decision.

**ARGUMENT**

Governing regulations provide that the Board may grant a Petition for Reconsideration only if the petitioner shows that: "(1) the prior action [here, the Decision granting CSXT's

Petition for Declaratory Order] will be affected materially because of new evidence or changed circumstances” or “(2) The [Decision] involves material error.” 49 C.F.R. § 1115.3(b). The decision to grant or deny a reconsideration or reopening petition is committed to “the sound discretion of the agency, and only on a showing of a clear abuse of that discretion could a court overrule the agency.” STB Doc. No. AB-457-X, *RLTD Railway Corp. – Abandonment Exemption In LeeLanau County, Michigan* (Oct. 30, 1997); *see ICC v. BLE*, 482 U.S. 270, 278 (1987). The District does not assert any new evidence or changed circumstances, so it may prevail only if it shows the Decision was materially erroneous. As demonstrated below, the District’s Reconsideration Petition entirely fails to make any showing of material error, and the Reconsideration Petition should be denied.

**I. THE DISTRICT CANNOT REFUTE THE DISPOSITIVE FACT THAT THE D.C. ACT IS AN ATTEMPT TO REGULATE RAIL TRANSPORTATION ROUTES, AND THE EXCLUSIVE POWER TO REGULATE SUCH ROUTES IS VESTED IN THE BOARD.**

The District of Columbia “Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005” (the “DC Act” or “Act”), by its express terms, purports to prohibit the routing of certain rail (and truck) traffic through the District of Columbia (the “District”), thereby requiring that such traffic be diverted to “alternative routes.” *See* D.C. Act at 1, 2. Indeed, there is no dispute – nor could there be – that the primary practical effect of enforcement of the Act would be to require rerouting of covered freight traffic from its normal course along rail lines within the District of Columbia, to some alternative routing outside the geographic boundaries of the District.

Such state or local regulation of rail traffic routing is precisely the type of regulation that is expressly preempted by ICCTA, which provides in relevant part:

The jurisdiction of the Board over –

(1) transportation by rail carriers . . . with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers . . .

is exclusive. . . [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.<sup>1</sup>

49 U.S.C. § 10501(b) (emphasis added). As numerous courts have found, it is difficult to imagine a more clear congressional command of federal preemption than that expressly prescribed by Section 10501(b). *See* Decision at 7-8 and cases cited therein. Regulation of rail carrier routes and of the movement of freight by rail carriers – the aim of the DC Act – falls within the core of the Board’s exclusive jurisdiction, and Congress has clearly and unequivocally mandated that all state and local legislation regarding this topic is preempted by federal law. *See* Decision at 8 (“By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad’s traffic should be routed.”). This is a pure question of law, and no additional fact gathering or evidence, or weighing of the DC Act’s burden on commerce is necessary. The express, unambiguous language of the statute admits only one conclusion: ICCTA preempts the DC Act, which is therefore null and void. *See generally, Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724, 738 (1985); *Shaw v. Delta Airlines*, 463 U.S. 85, 95 (1983) (preemption of state law is compelled if Congress’ command is explicitly stated in the federal statute’s language).

Because the DC Act is clearly and expressly preempted, the District’s various arguments in opposition to a finding of preemption (*e.g.* regarding the purpose of the DC Act, or the claim that the Act was an exercise of local “police power,” or the District’s labeling of the Act as a

<sup>1</sup> The District is considered a “State” for purposes of ICCTA. *See* 49 U.S.C. § 10102(8). The status of the District (including whether it is to be considered or treated as a “state” or “local”

“security” or “safety” measure) are simply not relevant. “The pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.” *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9<sup>th</sup> Cir. 1998) (rejecting argument that ICCTA only preempted economic regulation of railroads, and holding that ICCTA preempted state and local environmental regulations that affected railroad operations); *see CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993) (“If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.”); *Friberg v. KCS Railway*, 267 F.3d 439, 443 (5<sup>th</sup> Cir. 2001). As a matter of law, the DC Act’s attempt to regulate rail routes and the movement of rail traffic traversing the district is preempted by ICCTA, whose plain, express terms exclusively reserve to the STB all authority to regulate railroad routes and the movement of freight rail traffic. This straightforward analysis and conclusion ends the inquiry, and renders all of the District’s contrary arguments – both in its original submission and when repeated in its Reconsideration Petition – immaterial and entirely unavailing.

**II. NONE OF THE ARGUMENTS THE DISTRICT MAKES IN ITS PETITION PROVIDES ANY BASIS FOR RECONSIDERATION OF THE BOARD’S SOUND ANALYSIS AND DECISION.**

As demonstrated in the preceding section, the DC Act is preempted by the clear, express terms of ICCTA, and all of the District’s other, peripheral arguments are irrelevant. Nonetheless, CSXT demonstrates below that the District’s other arguments provide no basis for reconsideration of the Decision.

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government entity) varies under different statutes and laws.

**A. The Board Adequately Considered the Arguments Presented, and Appropriately Exercised its Expert Judgment to Conclude ICCTA Preempts the DC Act.**

The Decision adequately addressed the claims and arguments of the District of Columbia, considering and disposing of those arguments in a soundly reasoned Decision, holding that the DC Act is expressly preempted by ICCTA. *See, e.g.*, Decision at 2, 4-6, 8-10. Contrary to the District's assertions in its Reconsideration Petition, the Decision addressed all material, relevant arguments raised by the District in opposition to CSXT's Petition for Declaratory Order.<sup>2</sup> Moreover, while an agency should address significant, material arguments raised by a party, it is not obliged to address each and every assertion or argument raised by every party. *See, e.g.*, *Pharaon v. Board of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998) (agencies "have no obligation to respond at all to insubstantial arguments"); *Reyblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997); *Simpson v. Young*, 854 F.2d 1429, 1434-35 (D.C. Cir. 1988) (agencies are "not required to address every argument advanced by [a party] no matter how minor or inconsequential the argument may be."). Here, the Board addressed all significant arguments raised by the District, and the Decision represents both a

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<sup>2</sup> The D.C. Circuit decision upon which the District relies so heavily, *New York Cross Harbor Railroad v. STB*, 374 F.3d 1177 (D.C. Cir. 2004), is inapposite. *First*, that case (which was not a preemption case) involved the court's determination that the agency had failed to apply, or even to distinguish, its own, uniform precedent, and that the agency had, tacitly and without explanation, reversed that well-established precedent by issuing an order that directly conflicted with that precedent. *See id.*, 374 F.3d at 1181-83. Here, in stark contrast, the Board *followed* and *applied* the clear rule of law established by a long line of precedents, including myriad ICC and STB decisions, as well as numerous decisions of the D.C. Circuit and other federal courts. *See, e.g.*, Decision at 7-8. *Second*, unlike the fact-intensive inquiry in *NY Cross Harbor*, this case involves a pure question of law, and does not require an extensive fact inquiry or balancing of the competing interests of the parties – Congress considered those interests, and expressly and unequivocally mandated that regulation of rail routes and car movements (the subject matter of the DC Act) was the exclusive responsibility of the federal government in general, and the STB specifically. *Compare* 49 U.S.C. § 10501(b) with *NY Cross Harbor*, 374 F.3d at 1183-88 (agency established four factor, fact-intensive balancing test to be used for determination of

straightforward application of the express terms of a federal statute, and the exercise of the expert judgment of the agency specifically charged by Congress with the administration of that statute.

The District's argument that the Board did not adequately consider relevant facts is wrong on the law and mischaracterizes the record. *First*, because the DC Act on its face purports to regulate directly both rail routes and the movement of rail cars in interstate commerce, no detailed factual inquiry is necessary to determine the narrow question that was before the Board – whether the DC Act is preempted by ICCTA. This case is readily distinguished from the cases cited by the District (and addressed by the Decision), because those cases involved an attempt by a state or local government to regulate an activity that was ancillary, or only indirectly related to, the subjects and activities regulated by the Interstate Commerce Act. *See, e.g., Florida East Coast Railroad v. City of West Palm Beach*, 266 F.3d 1324 (11<sup>th</sup> Cir. 2001) (conducting fact-specific inquiry to determine whether ICCTA preempted application of local environmental ordinance to activities of rock aggregate plant located on railroad property but neither owned nor operated by a railroad). Where, as here, the state law in question attempts to regulate directly core railroad functions expressly and exclusively governed by ICCTA – including the routing and movement of rail cars in interstate commerce – no balancing of the burden of the local ordinance on interstate commerce is necessary or appropriate.<sup>3</sup>

*Second*, the District's claim that it was not allowed to present evidence to the Board is incorrect. The Board's rules and procedures governing adjudicatory proceedings allow

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whether abandonment was in the public interest, but then made a single factor dispositive, gave short shrift to two other factors, and did not even consider the fourth factor).

<sup>3</sup> Thus, while the Decision accurately notes that the DC Act would unreasonably burden interstate commerce, such a finding is not necessary to the Decision's holding that ICCTA preempts the DC Act.

participants to gather, prepare and submit evidence. *See, e.g.*, 49 C.F.R. §§ 1114.1 to 1114.29, *see also id.* §§ 1112.1 to 1112.10, 1113.1 to 1113.19. Although these rules provide ample authority and opportunity to submit evidence, the District elected not to submit such evidence.<sup>4</sup> The fact that neither CSXT nor the District submitted evidence beyond the basic facts described in their briefs is further testament that all participants understood – at least prior to the District’s filing of its reconsideration petition – that the question of ICCTA preemption was a pure question of law, and no additional factual evidence was necessary to decide that question. *See Consolidated Rail Corp. – Declaratory Order Proceeding*, STB Doc. No. 34139 slip op. at 7 (served Oct. 10, 2003) (no discovery necessary when issue presented is purely legal); *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983) (where the issue is “solely one of statutory interpretation,” its resolution “does not require the development of a factual record.”).<sup>5</sup> Having failed to avail itself of the opportunity to submit evidence at the appropriate time, the District is estopped from complaining on reconsideration that the Board did not consider (hypothetical) evidence the District belatedly contends it *might have* submitted.

**B. Neither Tyrell Nor Any Other Decision Cited by the District Suggests the Board’s Decision is Erroneous or that Reconsideration is Appropriate.**

The District misconstrues the law when it argues that *other* federal safety and security laws that do not even reference ICCTA somehow preclude a finding that ICCTA preempts the

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<sup>4</sup> Nothing in the Board’s decisions in this case prevented the District from filing evidence. Indeed, if the District believed (erroneously) that the Board might have intended to depart from its rules and prevent the District from filing evidence, it could have sought clarification from the Board. It did not do so. Thus, the District’s assertion that the Board did not “allow the District to present its own evidence” is flatly wrong.

<sup>5</sup> *See also Mackey v. Montrym*, 443 U.S. 1, 15, n. 8 (1979) (rejecting driver’s claim that he had right to evidentiary hearing on applicability of state implied consent law because such an approach “would be ill-suited for resolution of such questions of law”); *Hecla Mining Co. v. United States*, 909 F.2d 1371, 1374 (10<sup>th</sup> Cir. 1990) (“[S]tatutory interpretation . . . does not require the development of a factual record.”).

DC Act. *See* Recon. Pet. at 4-7. The District is apparently contending that the hypothetical possibility that the DC Act might be found to be excepted from the separate preemption provisions of different federal statutes somehow affects whether the statute at issue here (ICCTA) preempts the DC Act. This is wrong as a matter of law and as a matter of logic.

1. The Hypothetical Possibility That A Separate and Distinct Federal Statute May Not Preempt the DC Act Has No Effect on the Board's Conclusion that ICCTA Does Preempt It

The primary case upon which the District relies involved the question of whether the Federal Rail Safety Act ("FRSA") preempted a state safety law regulating the distance between railroad tracks. *See Tyrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6<sup>th</sup> Cir. 2001). In *Tyrell*, the Board, participating only on appeal in what was otherwise a dispute between private parties, filed a brief expressing its position that the state safety law was not subject to ICCTA, but instead was subject to applicable provisions of the FRSA. *See Tyrell*, 248 F.3d at 521-24. The Court accorded great weight to the expert judgment and positions of the Board and the FRA (which is charged with administering the FRSA), and the two agencies' cooperative "jurisdictional management" determination that provisions of FRSA (rather than ICCTA) applied to a state statute whose primary purpose was safety and which only tangentially affected matters potentially addressed by ICCTA. *See id.* (relying upon "federal agency input regarding the jurisdictional relationship between the ICCTA and FRSA" and the agencies' "complementary exercise of their statutory authority").<sup>6</sup>

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<sup>6</sup> *Tyrell* did not find, as the District claims, that a statute that was otherwise preempted by ICCTA was "saved" from preemption by FRSA. Rather, the court held, deferring to the agencies' consensus position, that the state law pertained to a subject that was not governed by ICCTA, and so there could be no ICCTA preemption in the first instance. *Id.* at 522-24. *Tyrell* then went on to conduct a FRSA preemption analysis, and concluded that the state law at issue was not preempted, because it fell within the FRSA "savings clause" that allows states to regulate in areas covered by the statute if the FRA has not issued regulations covering the subject addressed by the state law. *Id.* at 525. Here, the DC Act directly and unambiguously purports to

Here, by contrast, the Board has exercised its expert judgment and determined that the state regulation at issue (the DC Act) is preempted by ICCTA because it purports to regulate railroad routes and other matters at the heart of the STB's exclusive jurisdiction. *See* Decision. In any event, comments submitted by the U.S. Department of Transportation (on behalf of the FRA and other transportation safety agencies) make clear that, to the extent the DC Act also attempts to regulate rail safety and security, it is also preempted by comprehensive federal regulations issued under the FRSA and the Hazardous Materials Transportation Act ("HMTA"). *See* U.S. DOT Comments at 3-13 (Feb. 16, 2005); *cf. Tyrell*, 248 F.3d at 525 (state rail safety law not preempted by FRSA because FRA had not issued regulations covering the subject matter addressed by the state law).<sup>7</sup>

Contrary to the District's apparent belief, the fact that the DC Act may also be preempted by other federal laws has no bearing or effect on the Decision's holding that ICCTA preempts the DC Act. The District's counterintuitive argument rests on two erroneous assumptions, neither of which finds any support in the law: (i) that only one federal law may preempt a particular state law; and/or (ii) that if one federal law preempts a state law and a second federal law concerning a related subject does not preempt the state law, then the first federal law's

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regulate rail carrier activities that are governed by ICCTA. And, unlike FRSA, the preemption provision of ICCTA contains no savings clause. The Board's finding that the DC Act regulates rail routes ends the analysis, and ICCTA preempts the DC Act as a matter of law.

<sup>7</sup> The District also misunderstands the nature of the FRSA savings clause. FRSA does *not* carve out an area of rail safety regulation that is exclusively reserved to the states, nor does it confer upon states any affirmative statutory authority to issue rail safety regulations. Rather, FRSA provides a limited exception to its broad preemption of State safety laws *if and only if* the FRA has not issued regulations pertaining to the subject or activity covered by the state law. *See, e.g. Tyrell*, 248 F.3d at 525 (finding state law regarding minimum track clearance not preempted "because no FRA regulation or action covers the subject matter of minimum track clearance, the [state] regulation serves as a permissible gap filler in the federal rail safety scheme.").

preemptive effect is somehow vitiated.<sup>8</sup> State laws are frequently found invalid or unenforceable on several different and independent grounds, and the fact that the DC Act may (or may not) also be preempted by *other* federal statutes (and the Constitution) provides no basis for reconsideration of the Decision's sound conclusion that ICCTA preempts it.<sup>9</sup> *See, e.g., Deford v. Soo Line RR Co.*, 867 F.2d 1080, 1088-89 (8<sup>th</sup> Cir. 1989) (state law preempted by both the Railway Labor Act and by the Interstate Commerce Act). There is no basis in law or logic to suggest that the clear preemptive effect of one federal statute is eliminated if a different federal statute does not have preemptive effect.

2. The Board's Exercise of its Discretionary Authority to Issue a Declaratory Order in this Case is Consistent with its Exercise of that Authority in Prior Proceedings.

The District asserts that the Board should have denied CSXT's request for a declaratory order because a challenge to the DC Act (on several different, independent grounds, including ICCTA preemption) is pending in federal district court. *See* Recon. Pet. at 6 (citing *Green Mountain Railroad Corporation – Petition for a Declaratory Order*, STB Finance Docket No. 34052 (served May 28, 2002)). The District's argument mischaracterizes a discretionary decision of the Board in a single specific case (*Green Mountain*), and fails to explain the specific, narrow context in which the Board rendered that decision. In *Green Mountain*, the Board suspended a declaratory order proceeding – at the request of the *petitioner* – in light of a

<sup>8</sup> As the comments of DOT make clear, the DC Act is simultaneously preempted by multiple federal statutes. The DC Act also violates the Commerce Clause of the U.S. Constitution, by unreasonably discriminating against interstate commerce. Only ICCTA is administered by the Board, however, and the Decision appropriately addressed only the effect of that statute.

<sup>9</sup> If, for example, a state law purported to regulate both the terms of an employee benefit plan covered by ERISA and the question of whether and to what extent collective bargaining regarding the terms of such a plan is subject to the National Labor Relations Act, there would be no question that law would be preempted by both ERISA and the NLRA. *See generally Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) (discussing broad preemption effected by both ERISA and the NLRA, and addressing NLRA preemption despite first holding that state law at issue was excepted from ERISA preemption by a savings clause).

pending district court action challenging the same state law. *Green Mountain*, Decision at 3. In the district court case, the court denied a motion to refer the proceedings to the Board, indicating that it wished to resolve the preemption issue without the Board's input.

Several months later, the petitioner changed its mind and asked the Board to vacate its prior decision to hold the declaratory order proceeding in abeyance, and to reinstitute the proceeding to render a determination of whether ICCTA preempted the state law at issue in the district court proceeding. *Id.* The Board, noting that it had discretion (under the APA) over whether to issue a declaratory order, and further noting the district court's desire to resolve the issue without referring it to the agency, denied the petitioner's motion to reinstitute the proceeding, and deferred to the district court's wishes by exercising its discretion not to issue a declaratory order. *Id.* at 4. Nonetheless, to provide guidance to the court and to the parties, the Board issued an opinion describing the nature and scope of ICCTA preemption. *Id.* at 4-7.

The circumstances of the present case stand in sharp contrast to *Green Mountain*. There has been no motion in this case to stay the federal court proceedings and refer the matter to the Board, and the district court has issued no order expressing a preference that the issue be addressed solely in that court. Indeed, the District Court indicated on the record that it *was* interested in reviewing the STB's decision regarding ICCTA preemption, and that such a decision might assist the Court in its review of the DC Act. *See, e.g.*, Prelim. Injunction Hrg. Tr. at 30-31, 52 (Feb. 24, 2005). Thus, unlike *Green Mountain*, the circumstances of this case presented no reason for the Board to exercise its discretion to decline to issue a declaratory order. *See* Decision at 5 (noting that Board "has broad discretion to determine whether to issue a declaratory order.").

Moreover, the District's *Green Mountain* argument is now moot in any event, because a suit seeking to enforce the Decision has been filed in the same District Court, which now has pending before it CSXT's challenge to the DC Act as preempted by several federal laws and unconstitutional, and a case brought by the United States and CSXT seeking enforcement of the Board's Decision. The Court hearing those cases will decide whether to enforce the Board's order, as well as CSXT's other challenges to the DC Act.<sup>10</sup>

In sum, the District has failed entirely to meet its burden of demonstrating that the Decision involved material error, and has not even argued that changed circumstances or new evidence materially affect the Decision. *See* 49 C.F.R. § 1115.3. Instead, the District simply repeats the arguments it previously made in opposition to CSXT's petition for declaratory order, arguments that the Board adequately considered and rejected the first time, and which it should not reconsider.

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<sup>10</sup> The District neglects to mention that the only other case it cites in support of its *Green Mountain* argument expressly held that ICCTA preempted state and local environmental permitting regulations because such preclearance requirements "by their nature interfere with rail transportation by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations." *Auburn and Kent, WA – Petition for Declaratory Order Burlington Northern RR – Stampede Pass Line*, 2 STB 330 (1997), *aff'd*, *City of Auburn*, 154 F.3d 1025. In addition, both *Green Mountain* and *City of Auburn* rejected the argument – advanced here by the District – that ICCTA preemption is limited to state and local "economic" regulations. *See Green Mountain* Decision at 5 (such a limitation "has been rejected as contrary to the statutory text and unworkable in practice.").

## CONCLUSION

For all of the foregoing reasons, CSXT respectfully requests that the Board deny the  
Petition for Reconsideration.

Respectfully submitted,



G. Paul Moates

Terence M. Hynes

Paul A. Hemmersbaugh

Sidley Austin Brown & Wood LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

(202) 736-8711 (fax)

Irvin B. Nathan

Mary Gabrielle Sprague

Arnold & Porter LLP

555 Twelfth Street, N.W.

Washington, DC 20004-1205

(202)-942-5000

(202) 942-5999 (fax)

Ellen M. Fitzsimmons

Peter J. Shudtz

Paul R. Hitchcock

CSX Transportation, Inc.

500 Water Street

Jacksonville, Florida 32202

(904) 359-3100

Dated: March 31, 2005

### CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Reply of CSX Transportation, Inc. to the Petition for Reconsideration of the District of Columbia to be served upon all Parties of Record to Finance Docket No. 34662, this 31st day of March 2005, as follows:

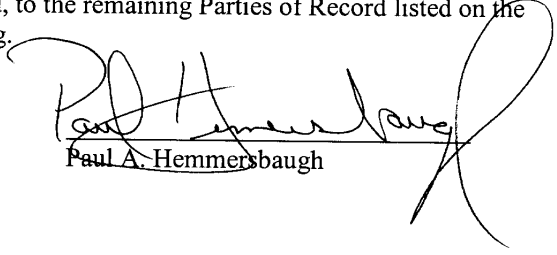
By Hand Delivery to:

George Valentine  
Robert Utiger  
Richard S. Love  
Andrew J. Saindon  
Office of the Attorney General  
District of Columbia Government  
441 Fourth Street, N.W., 6<sup>th</sup> Floor South  
Washington, D.C. 20001

James R. Wrathall  
Marc J. Blitz  
Leondra R. Kruger  
Wilmer Cutler Pickering Hale & Dorr LLP  
2445 M Street, N.W.  
Washington, D.C. 20037

Jim Dougherty  
Sierra Club – Washington, D.C.  
408 C Street, N.E.  
Washington, D.C. 20002

and by first class mail, postage prepaid, to the remaining Parties of Record listed on the official Service List for this proceeding.



Paul A. Hemmersbaugh